

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)
Charter Communications) CSR-6456-E
Twelve Petitions for Determination of Effective) CSR-6457-E
Competition in Twenty-Three Local Franchise) CSR-6458-E
Areas in Oregon) CSR-6459-E
) CSR-6460-E
) CSR-6461-E
) CSR-6462-E
) CSR-6463-E
) CSR-6464-E
) CSR-6465-E
) CSR-6466-E
) CSR-6467-E

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 2005

Released: June 13, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers twelve petitions filed with the Commission by Charter Communications, on behalf of its affiliates, ("Charter") pursuant to Sections 76.7, 76.905(b)(1) & (2) and 76.907 of the Commission's rules for a determination that Charter's cable systems serving twenty-three Oregon communities ("the Communities") are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act") and are therefore exempt from cable rate regulation.1 The Communities are listed in Attachment A. No opposition to any petition was filed. Charter's petitions are granted in part and denied in part.

II. DISCUSSION

A. Competing Provider Effective Competition

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,2 as that term is defined by Section 623(1) of the Communications Act, and Section 76.905 of the Commission's rules.3 The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

1 47 C.F.R. §§ 76.7, 76.905(b)(1)& (2), 76.907; 47 U.S.C. § 543(a)(1).

2 47 C.F.R. § 76.906.

3 47 C.F.R. § 76.905.

within the relevant franchise area.⁴

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁵ Turning to the first prong of this test, the DBS service of DirecTV, Inc. ("DirecTV") and DISH Network ("DISH") is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁶ The two DBS providers' subscriber growth reached approximately 23.16 million as of June 30, 2004, comprising approximately 23 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the fourth largest, MVPD provider.⁷ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the communities listed on Attachment A are DBS subscribers, we conclude that the population of communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer substantially more than 12 channels of video programming, including more than one non-broadcast channel.⁸ We further find that the Charter cable systems have demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area.⁹ Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and DISH.¹⁰ Therefore, the first prong of the competing provider test is satisfied.

4. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SCBA") that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code basis.¹¹ Charter asserts that it is the largest MVPD in the Communities because its

⁴See 47 C.F.R. §§ 76.906 & 907.

⁵ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁶See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁷ *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, at ¶¶ 54-55 (rel. Feb. 4, 2005).

⁸See 47 C.F.R. § 76.905(g).

⁹ Charter Petition at 5 and Exhibit 2.

¹⁰ *Id.* at 4 and Exhibit 1.

¹¹ *Id.* at 6-7. Charter acknowledges that a standard five-digit zip code in certain cases may not coincide precisely with the boundaries of a cable operator's franchise area. To overcome this potential problem, Charter has applied a competitive penetration methodology. The Commission has approved this methodology for determining DBS subscribership. *See, e.g., In re Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002).

subscribership exceeds the aggregate DBS subscribership for those franchise areas.¹² With respect to the communities of Adams, Mount Angel and Sandy, Charter asserts that the respective aggregate allocated DBS subscriber figures (58, 277 and 776) are slightly larger than Charter's subscriber counts (52, 241 and 176) in those respective communities. However, Charter contends that it is likely that Charter is still the largest individual MVPD in these franchise areas.

5. Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data, we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in those noted Communities. With regard to the Communities of Adams, Mount Angel and Sandy, we are able to conclude that this portion of the test is met by analyzing the data submitted for both Charter and the DBS providers. If the subscriber penetration for both Charter and the aggregate DBS information each exceed 15 percent in the franchise area, the second prong of the competing provider test is satisfied.¹³ In Adams, the combined DBS penetration rate is 54.7 percent and Charter's penetration rate is 49 percent.¹⁴ In Mount Angel, the combined DBS penetration rate is 26.2 percent and Charter's penetration rate is 22.7 percent.¹⁵ In Sandy, the combined DBS penetration rate is 39.7 percent and Charter's penetration rate is 36.6 percent.¹⁶ Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that their cable systems serving the Communities set forth on Attachment A are subject to competing provider effective competition.

6. With regard to the unincorporated areas within Clackamas, Lane and Lincoln Counties, Charter states that it serves subscribers in a limited portion of these areas and 2000 Census Household data is unavailable.¹⁷ Accordingly, Charter states that it derived its DBS allocation figures from the total number of homes passed by its systems in each of these counties.¹⁸ Charter has not provided sufficient evidence that the number of homes passed by its systems is a suitable equivalent for the number of households, that is occupied housing units, in these franchise areas. The Commission has consistently accepted household data from sources other than the Census where such data provides "a sufficiently reliable basis for an effective competition determination."¹⁹ Here, Charter has failed to justify the substitution of the number of homes passed by its systems for the number of households in the franchise area. Without reliable evidence as to the number of households in each of these franchise areas, it is impossible for the Commission to accurately calculate whether effective competition is present in the relevant areas.²⁰ For this reason, we find that the second prong of the competing provider test is not met with regard to the unincorporated areas of Clackamas, Lane and Lincoln Counties, Oregon.

¹² *Id.* at 6. See also Declaration of Denise Jones-Williams, Director of Regulatory Compliance for Charter Communications (November 11, 2004).

¹³ See *Time Warner Entertainment Advance/Newhouse Partnership, et al.*, 17 FCC Rcd 23587, 23589 (MB 2002).

¹⁴ 58 DBS subscribers ÷ 106 Adams 2002 Census Households = 54.7%; 52 Charter subscribers ÷ 106 Adams Census Households = 49%.

¹⁵ 277 DBS subscribers ÷ 1,059 2000 Mount Angel Census Households = 26.2%; 241 Charter subscribers ÷ 1,059 Mount Angel Census Households = 22.8%.

¹⁶ 776 DBS subscribers ÷ 1,956 Sandy Census Households = 39.7%; 716 Charter subscribers ÷ 1,956 Sandy Census Households = 36.6%.

¹⁷ Charter Petition at n. 19.

¹⁸ *Id.*

¹⁹ See *Texas Cable Partners, L.P.*, 16 FCC Rcd 4718, 4721 (CSB 2001).

²⁰ Our decision herein is without prejudice to Charter bringing a future petition that adequately documents the number of households in these franchise areas.

B. Low Penetration Effective Competition

7. Section 623(1)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if “fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system.”²¹ Charter asserts that it is subject to effective competition in the Mount Angel franchise area under the low penetration effective competition test. Charter submitted information listed on Attachment A showing that its penetration rate in the Mount Angel franchise area is 22.8 percent. Accordingly, we conclude that that Charter has demonstrated the existence of low penetration effective competition under our rules in the Mount Angel franchise area.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petitions filed by Charter Communications for a determination of effective competition in the Communities listed on Attachment A **ARE GRANTED**.

9. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Charter Communications in the affected Communities **ARE REVOKED**.

10. **IT IS FURTHER ORDERED** that the petitions filed by Charter Communications for a determination of effective competition in the unincorporated areas of Clackamas, Lane and Lincoln Counties, Oregon **ARE DENIED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²²

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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²¹ 47 U.S.C. § 543(1)(1)(A).

²² 47 C.F.R. § 0.283.

Attachment A

Charter Cable Systems Subject to Competing Provider Effective Competition

CSR-6456-E through CSR-6467-E

Communities	CUIDS	CPR*	2000 Census Households+	DBS Subscribers+
Adams, City	OR0211	54.7%	106	58
Astoria, City	OR0011	25.6%	4,235	1,084
Brookings, City	OR0181	26.4%	2,309	610
Cannon Beach, City	OR0042	16.6%	710	118
	OR0244,			
	OR0245			
	OR0370			
Curry County	OR0381	33.0%	4,501	1,486
	OR0382			
Dallas, City	OR0081			
	OR0224	35.9%	4,672	1,676
Dunes, City	OR0186	32.8%	558	183
Florence, City	OR0058	32.3%	3,564	1,152
Hood River, City	OR0050	38.5%	2,429	935
Independence, City	OR0082	37.7%	1,994	751
Lakeview, Town	OR0165	30.7%	1,037	318
Lincoln, City	OR0072	20.2%	3,371	682
Monmouth, City	OR0083	27.3%	2,757	754
Mount Angel, City	OR0343	26.2%	1,059	277
Reedsport, City	OR0040	29.7%	1,978	587
Roseburg, City	OR0124	30.6%	8,237	2,520
Sandy, City	OR0230	39.7%	1,956	776
Silverton, City	OR0342	34.9%	2,707	946

The Dalles, City	OR0016	24.9%	4,896	1,218
Toledo, City	OR0137	24.5%	1,312	321

Cable Operator Subject to Low Penetration Effective Competition

Communities	Franchise Area Households	Cable Subscribers	Penetration Level
Mount Angel	1,059	241	22.8%

CPR = Percent DBS penetration

+ = See Charter Petitions